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No. 5. Original.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES OF AMERICA, COMPLAINANT,

v.

JOHN F. SHIPP ET AL.

MEMORANDUM FOR THE UNITED STATES UPON EXCLUSION OF EVIDENCE.

In the Supreme Court of the United States.

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THE UNITED STATES OF AMERICA, complainant, v. JOHN F. SHIPP ET AL. } No. 5. Original.

MEMORANDUM FOR THE UNITED STATES UPON EXCLUSION OF EVIDENCE.

I.

Some Important Evidence which is Incompetent and Prejudicial.

Some of the evidence introduced by defendants is so clearly irrelevant to the issues of this case and is so prejudicial to a fair consideration of the merits that it should be excluded without question. It needs no argument to demonstrate the incompetency of the following evidence, all of which was objected to by complainant's attorney:

I. EVIDENCE RELATING TO GUILT OR INNOCENCE OF JOHNSON.

Defendant Shipp testified that when in Nashville on January 26, the day after Johnson's arrest, at his request the young lady who was raped and her brother

73330—09——1

came there to see if she could identify the prisoner as the one who committed the crime. He says that he met the lady and her brother at the station and had supper with them. He continued his testimony as follows:

> I said to Miss Taylor, "I am going to take you over to the county jail, where I have two prisoners. I want you to see them both and see whether you can identify either of them."
>
> After we had gotten our supper we got in a carriage with the sheriff and drove to the county jail. On the way to the jail I said to Miss Taylor, "What is there that you can remember about the man that assaulted you by which you can identify him?"
>
> * * * * *
>
> I went on then to describe the man, stating that he was a colored man, a little taller than she was; that he was dressed in a dark suit of clothes, and had on an old soft black hat, and that the coat was cut round cornered. That filled the description of Johnson. Then she remarked, of her own volition, that he had a very soft kind voice—so much so that she was surprised that one with a voice like that would have been guilty of such a crime. If she had talked to the man a thousand times she could not have described his voice any more correctly.
>
> * * * * *
>
> That was so characteristic of his voice and his voice was so peculiar that it had been re-

marked by others who had talked with him on the way to Nashville.

* * * * *

When we arrived at the jail, I, with the sheriff, carried Miss Taylor and her brother into the sheriff's office. Miss Taylor and her brother were seated, and I notified them that I would retire and bring in these two prisoners; but before bringing them in, notwithstanding that we had an electric light, I had the gas lighted that we might have a good strong light.

After bringing the two prisoners in and standing them before her, and leading them in conversation, I passed them out of the room, and then returned and said to Miss Taylor, "Which of these men, if either, is the man who assaulted you?"

* * * * *

She said, "The man that stood to your left." That was Johnson. Then she remarked, "I never expected that you would be able to bring anyone before me who I could identify with so much satisfaction to myself."

* * * * *

I then passed Miss Taylor and her brother out of the room and I brought in Wyatt first into the room in the presence of the sheriff and myself, and we had some talk with him, and then returned him to the officers in the hall and brought in Johnson. I then confronted Johnson with the strap that I had in my pocket, that I had picked up on the ground at the spot

where this young woman was assaulted, and stated to him that the young lady had identified him as the guilty man.

* * * * *

We then passed Johnson back to the officers in the hall. Johnson took from his finger a large ring and handed it to one of the officers and said to him, "They say I am the guilty man, and I want you to send this ring to my people." I will not be sure whether he said to his people or his mother, but to some of his people.

We then left the jail and went to the hotel and remained there during the night. Before leaving I instructed the sheriff to hold these two men, keeping them separated, for further orders.

The next morning I returned with Miss Taylor and her brother to Chattanooga. (2143–2147.)

Samuel T. Dewees, a witness for defendants, testified, over objection by complainant, as follows:

Q. I will ask you whether or not there was a settled conviction on the part of the law-abiding element in Chattanooga, both at the time he was tried and afterwards, and at the time of the lynching, that this defendant was guilty?

A. Yes, sir. (1942.)

II. EVIDENCE AS TO MARKS OF THE CRIME UPON THE LADY.

Rev. J. W. Bachman testified that he went to the home of the lady who was raped the day after the

crime and saw her and her family. He testified as follows:

> Q. State whether or not, when you went there, the marks of the assault were upon the person of this girl.
>
> * * * * *
>
> Q. You may answer the question, Doctor. I asked you whether or not, when you went there, you saw the girl?
>
> A. Yes, sir; I saw the girl.
>
> Q. I will ask you whether the marks of the assault were still upon her person?
>
> * * * * *
>
> A. Well, I went to see the family. I had been with the family some time before, and I went just to have some condolence with them, as I felt was my duty as a minister. The old gentleman brought in his daughter, and a red mark was around her neck, and he said to me: "Brother Bachman, this thing has put me back in civilization a thousand years." He said: "I am a savage." I stayed with them a while and talked with them as best I could and tried to comfort them, and then left. (1807, 1808.)

III. TESTIMONY INTRODUCED TO SHOW THAT JOHNSON HAD A FAIR TRIAL.

M. N. Whittaker, who prosecuted Johnson, testified that before the trial he had an interview with defendant Shipp in the presence of attorneys for Johnson and that—

> Captain Shipp was very anxious, as well also as the judge and myself, that no mistake be made with reference to the fact as to whether

or not we had the man that committed the outrage; so he suggested that he would very gladly put opposing counsel in possession of all the facts that he knew, if it was proper to do so. I said to him that that was unusual, in fact unheard of, but that I believed it was a proper suggestion. Acting on that suggestion, I called the counsel for the defendant, Ed. Johnson, and Captain Shipp into Judge McReynolds's office, and in his presence had Captain Shipp state to opposing counsel all the facts that were in our possession, giving the names of the witnesses and what each would prove, and where each lived, so that opposing counsel might have full and fair opportunity to investigate the soundness of the state's testimony, in order that no mistake might occur and that we might possibly convict an innocent man. That was what was done.

Q. By "opposing counsel" you mean, of course, the attorneys for Ed. Johnson?

A. Yes, sir. (1636–1638, 1640.)

S. D. McReynolds, the judge who sat at the trial of Johnson, testified as follows:

Q. What do you know about Captain Shipp's giving the attorneys for the defense such information as he had with reference to who would testify for the State and the character of the testimony.

A. I know he did that, and I further know that I requested him to do it. They were all in my office, the attorneys for the defense, together with Mr. Whitaker, and I remember Captain Shipp talking about the case; and I

asked him especially, there in the presence of these gentlemen, "Captain, I wish you would go over, in detail, all the proof you have against this man, and give them the names of the witnesses who will testify to this particular state of facts so that they will not be met with any surprise, and so that these gentlemen can investigate it and put up a proper defense for this defendant." That was done.

Q. He did that, and gave them a full statement of the testimony the State had?

A. Yes, sir.

* * * * *

Q. Judge, the statement given by Captain Shipp to the attorneys for the defense was a full and fair statement of what the evidence turned out to be, was it not?

A. Yes, sir. The only surprise (and that was a surprise to both sides) was in reference to a clock. Some of the defendant's witnesses proved an alibi by a certain clock, and we sent an officer out to find the man who put the clock in, and brought him in without knowing he would say the clock was there. That was the only surprise.

* * * * *

Q. That evidence with reference to the clock was testimony that was not in Captain Shipp's keeping at the time he informed the counsel for the defendant what the State's evidence was?

A. Certainly. He did not know what the proof would be, and then when the party who put the clock in was sent for it was not known what he would state. He was sent for to get the truth. (1738-1739.)

Defendant Shipp testified as follows:

Q. State who, if anyone, was appointed to defend Johnson during the trial, and how the trial was conducted.

A. I do not think there ever was a prisoner that was so well defended, and by more able lawyers.

* * * * *

It was the great anxiety of the criminal judge, the attorney-general, and the defendant's attorneys, as well as myself, that the man should be tried and that the law should be upheld.

A conference was held, and a good many suggestions were made with reference to how the prisoner should be brought back safely and protected during the trial, and it was suggested that I go to Nashville and call upon the governor for two companies of militia, that they might accompany me back with this prisoner, to secure his safety, and to assist in protecting him during the progress of the trial.

Johnson's three attorneys were there, the criminal judge, and the attorney-general, the Rev. Mr. Bachman, and the mayor of the city, all of whom were very much interested in seeing that the man was protected and that the law was upheld.

I said to them that I would undertake to bring this man back myself individually; that if the militia was called for I could not control them, and the chances were there might be a lot of people killed; and that I would undertake to bring the man in safety, and I believed I

could do it, and not only protect the prisoner but protect the community. (2148–2150.)

Rev. J. W. Bachman testified:

> A. At the time, as I believe, the sheriff, as oftentimes the other officials, dropped into my study and had consultations with me. We had some consultations in regard to that, and the effort to arrest and obtain the prisoner, or the man who was suspected of the rape? At that time we held a consultation with the sheriff and the judge. I was called by the criminal judge into council with the sheriff and the attorneys on both sides, about the trial of the case and what we thought ought to be done, and everything seemed to me to be a desire to give the man a fair hearing and—I was called as an old citizen and as having to do with a great many things. I am a preacher, but they make me do everything. The judge sent for me; I do not know but what the sheriff himself came for me to go over to that council, and the question was up whether we could have a fair trial, and we agreed that we could and then the trial proceeded. (1798.)

IV. EVIDENCE AS TO CHARGE OF JUDGE McREYNOLDS TO THE GRAND JURY AND ITS ACTION RELATIVE TO INDICTING LYNCHERS.

The charge of Judge McReynolds to the grand jury relative to indicting the parties of the mob or officials for their acts or neglect in connection with the lynching of Johnson was introduced. (1761-1763.)

In connection with its introduction Judge McReynolds testified:

> Q. I will ask you if you charged the grand jury after that, and if you did not have your grand jury investigate this lynching?
>
> A. I certainly did, and I gave my grand jury the name of every party that I had any information was at that lynching that night. I delivered a pretty strenuous charge to them. (1760.)
>
> Q. Now, Judge, were any indictments found by the grand jury?
>
> A. No, sir.
>
> Q. After an investigation of that affair, did your grand jury make any complaint against Captain Shipp?
>
> A. No.
>
> Q. Or any of his deputies; any of these defendants?
>
> A. No, sir. (1763.)

Mr. Whittaker testified:

> Q. I will ask you whether or not the state criminal court of which you are attorney-general has attempted to investigate and indict those lynchers since that time?
>
> A. Oh, yes; Judge McReynolds gave the grand jury a special charge with reference to it, and directed their attention in very strong language toward the violation of the law in that respect; and I had summoned many witnesses before the grand jury to investigate it; and I violated my usual way of doing business by going before the grand jury and directing them, if they could find any evidence that would

connect any parties with that lynching, that would in anywise justify the return of an indictment, that I wanted one returned.

Q. I will ask you if the investigating officers for the Government—I mean by that the detectives, or inspectors—laid before you any of the evidence they had gathered up or gave you any assistance whatever in investigating that matter before your grand jury?

A. None whatever. I do not know any of those gentlemen, and never did meet them. (1659–1660.)

J. S. Bell testified that he was foreman of the grand jury which investigated the lynching of Johnson and as follows:

Q. I will ask you to state whether or not your grand jury made a special investigation of the Ed. Johnson case, or were you called together specially for the investigation of that case?

A. I do not know that we were, especially. We were the regular grand jury at the time, and were charged to investigate it, and did try to do it.

Q. The grand jury was in session when the lynching occurred, was it not; or were you reconvened? How was that?

A. No, I think it was not in session when it occurred. It was afterwards.

Q. And your grand jury was reconvened after the lynching occurred?

A. Yes, sir.

Q. Upon the reconvening of the grand jury, state whether or not——

A. We were not the grand jury at the time it occurred. I think we were called afterwards as a separate jury.

Q. Oh, yes. State whether or not the criminal judge gave a charge with reference to that lynching.

A. Yes, sir.

Q. With reference to investigating that lynching?

A. Yes, sir.

Q. What did you do with a view to finding out who participated in that lynching?

A. We summoned quite a number of parties and examined them in order to find out what had occurred.

Q. You even went to the extent of summoning the judge and the Attorney-General both?

A. We summoned the court and the Attorney-General and some other officers, some of the state guards, and various others that we thought ought to know something about it, and it had somehow come to us that they did know, possibly, something.

Q. I will ask you to state whether you made an earnest and energetic effort to find out who it was who participated in the lynching.

A. Yes, sir.

Q. And you got no testimony that would authorize you to return a true bill against anybody?

A. No, sir; we did not find enough, as we thought, to warrant us in doing anything of the kind. (2128, 2129, 2130, 2131.)

II.

Miscellaneous Evidence Which Should be Excluded.

We submit for obvious reasons the following evidence, which was objected to, should be excluded:

Evidence that the girl's father was a northern man, wears a G. A. R. button, and was a federal soldier. (114, 115.)

Evidence that Captain Shipp is a mason. (665.)

Evidence as to orders, unions, etc., Galloway belongs to. (2078.)

Copy of indictment introduced to impeach the complainant's witness Franklin. (539.)

Evidence as to warrant for arrest of complainant's witness, Mrs. Lee, introduced to impeach her. (P. 1260 of printed record.)

Evidence as to the reputation of the business complainant's witness, Mrs. Baker, was engaged in, introduced to impeach her. (2203, 2204, 2209.)

Evidence as to why W. T. Center ordered the complainant's witness, Mrs. Baker, out of his house, introduced to impeach her. (2205, 2206.)

Prince, one of the witnesses called to support Ward's alibi, testified that the morning after the lynching Ward came into his saloon. He was asked, "What happened between you and Ward that fixed it on your mind that it was the next morning after the lynching?" to which he replied: "I believe Mr. Ward, after some conversation, told me Ed Johnson was lynched last night. I said, 'Frank, if you had not been so damn drunk last

night you might have been in that too.'" (1080, 1081.)

Ward also gave testimony of this same conversation. (1114, 1115.)

Mr. Whittaker testified:

> Mr. Spurlock suggested that perhaps we had better intercept Captain Shipp; that if there was any trouble really at the jail he might hurt some one or some one might hurt him. (1654.)

Judge McReynolds also testified that Spurlock said:

> Now, I know Captain Shipp very well, and he is liable to rush in there and get killed or kill somebody, and we had better get down there and tell him what we know about the situation, so we can go in there and be cautious about it. (1750.)

III.

Testimony relative to conversations between Defendant Shipp and others immediately after Johnson was taken from the jail.

M. J. Horan testified, against objection, that he saw Defendant Shipp right after the lynching, and that Shipp said to him: "My God, they have ruined me," and that he had the following conversation with him:

> I told Sheriff Shipp to sit down, and he started to sit down. Then he jumped back up and he said, "My God, I did everything I could." I said, "I know that, Sheriff." I said, "You are not to blame. You have done everything any man could have done." I said, "No one expected this." He said, "My God, no." I told him to sit down again. I

> asked him if I could get him a drink, and he shook his head. He said no. I asked him if he thought he was going to faint, with his head hanging over, and I walked out to see if I could get him a drink of water. I didn't see any, and I came back and resumed my conversation with him. I told him no one in the world knew anything about it. He said, "My God, I did not." I told him no one did. I told him I was down on the street, right there at the jail, before I heard or saw anything. (2119, 2120.)

This conversation is again referred to on page 2127.

These statements of Horan referred to in this testimony are clearly irrelevant and immaterial and can not be considered as having any tendency to prove whether or not the lynching of Johnson was apprehended or whether or not Shipp was in any way to blame. The statements made by Captain Shipp were mere self-serving declarations and they are obviously incompetent.

Mr. Whittaker testified over objection:

> Q. I will ask you whether or not, Mr. Whittaker, you made Captain Shipp acquainted with the efforts you had made to arouse the city?
>
> A. Yes.
>
> Q. And the failure you had met?
>
> A. Yes. I do not, however, accept the suggestion "to arouse the city." We simply tried to arouse such officers of the city as we thought could give the most assistance, if assistance was needed. (1658.)

What Mr. Whittaker may have done to prevent the lynching can have no bearing, so far as we can see, upon the guilt or innocence of Captain Shipp. Moreover, what Mr. Whittaker told Captain Shipp has no tendency to prove what Whittaker may have done and does not in any way excuse or explain the actions of Captain Shipp.

IV.

Testimony to the Effect that the Lynching Came as a Great Surprise to the Witnesses, that They did not Expect a Mob, etc.

Testimony to the effect that the witness was greatly surprised when he heard of the lynching is found on pages 622, 1621, 1622, 1649, 1693, 1707½, 1853, 1874, 1902, 1913, 1939.

Personal opinions of witnesses to the effect that they themselves did not expect that Johnson would be mobbed on March 19 are found on the following pages: 621, 659, 660, 664, 1534, 1648, 1649, 1713, 1742, 1746, 1845, 1895, 1902, 1930, 1931.

Testimony to the effect that other persons told the witness there was no apprehension of a mob or reason to apprehend one: Pages 1708, 1712–1714, 1722.

Testimony was also given as to the witness's impression as to whether there would be a mob. (1895.)

Complainant objects to all of this testimony.

The state of the public mind, whether or not there was public agitation or excitement over the delays in the Johnson case, were proper matters of inquiry in this proceeding. What a person saw or heard in the community tending to show the public feeling might be admitted upon these points, and if one had

made sufficient inquiry or observation to justify a conclusion as to the state of the public mind he might be permitted to testify as to what it was according to his investigation or observation, but it is clearly incompetent to show these facts by statements of individuals to the effect that they were surprised or did not expect the lynching, or that there was no reason to apprehend mob violence. As opinion evidence these statements should be excluded. One might have seen or heard enough to make most men believe that an attempt would be made to lynch Johnson, and yet he might himself have been surprised when the lynching occurred. The mere fact that certain persons were not convinced in their own minds that there was danger of a lynching is incompetent upon the point whether or not officers of the law, whose duty it was to be informed as to public feeling and dangers of violence, did in fact or had reason to expect an attack upon the jail.

Some of this evidence is merely hearsay.

V.

Testimony as to the Pastor's League and its Meeting the day of the Lynching.

Rev. J. W. Bachman testified that the pastors of Chattanooga have an association which meets every Monday morning and that it met on the morning of March 19, the day Johnson was lynched; that the association has a committee on law and order, the duties of which are to keep a lookout and see what things are going on and what violations are taking place in order that the ministers may be helpers to

the officials in seeing that the law is obeyed and that members of the association who desire a matter brought to the attention of the association report to the committee which brings the matter before the association; that it would have been the duty of the committee if it or any member of it had known or had reason to believe that there was apprehension that Johnson would be lynched to have reported such fact to the meeting; that no report was made by the committee and no reference was made at the meeting to apprehension of lynching. He also gave testimony as to the members of the committee and that a member of it reported on that Monday that he had been out among the saloons on the previous Saturday night with 25 or 30 men, with a view to getting men to attend services of the Y. M. C. A. on the following Sunday, but he made no report of any apprehension as to the lynching. (1810–1813.)

This evidence introduced to support the statement of Shipp and his subordinates that they did not apprehend mob violence has no tendency to prove such fact and should be excluded. The evidence does not show what anyone saw or heard in the community during the days preceding the lynching; at most it can only be considered as indicating the conclusion of certain men that a mob was not to be apprehended. This was a mere matter of opinion with them, and there is nothing to indicate the facts upon which this opinion was based. It is incompetent as opinion evidence, as well as being immaterial.

Rev. Ira M. Boswell gave evidence to the same effect. (1692.)

Mr. Bachman testified that there was a meeting of the Pastors' League on the Monday following the lynching, at which the lynching was discussed and resolutions were adopted condemning the lynching and deploring the condition of things and the disrespect shown the courts and law of the country. (1813.) Mr. Boswell gave testimony as to a sermon he preached the Sunday following the lynching. (1692.) These pieces of evidence are obviously incompetent.

All of the evidence here referred to was objected to.

VI.

Testimony as to individual opinion whether anything could have been done after Johnson was taken from the jail to have prevented the lynching.

Mr. Whittaker was asked, "When you and Judge McReynolds reached Captain Shipp after the mob had passed away, was there anything that could have been done by Captain Shipp that could have prevented the lynching at that time, that you saw?" to which he replied: "Any answer I could make to that would only be an opinion, but a very pronounced one, that it would have been idle and silly to try to intercept that mob under the conditions that then prevailed." (1659.)

Judge McReynolds, in response to a like question, testified:

> I have thought of it a good deal. Unless he had some of his officers there I do not see what good he could have done. I think it is an absurd idea to summon people to go there at that time after the mob. (1757.)

The same kind of testimony was given by Samuel T. Dewees, who was asked: "Whether or not you would have felt, and if you believed that other law-abiding citizens like you would have felt, like voluntarily risking your life to protect a man that you believed guilty of committing a crime of that kind?" He replied: "I do not know as I would like to risk my life to do it, no," and that he did not think others would have wanted to have risked their lives. (1942, 1943, 1944.)

This testimony was objected to and as opinion evidence it is clearly incompetent.

VII.

Evidence as to reasons why appeal was not taken in Johnson's trial in the state court which were not made public.

Considerable testimony was introduced by defendants as to the reasons why the lawyers in charge of Johnson's defense did not take an appeal from the judgment upon the verdict of guilty to the supreme court of the State of Tennessee. This testimony tended to show that the reason why an appeal was not taken was because the lawyers thought there was no reversible error in the case. (1683, 1784, 1785, 1951, 1952, 1959, 1960.)

Complainant introduced a statement made by Mr. Thomas, counsel for Johnson, of the reasons why an appeal was not prosecuted, one of the principal reasons stated being; that they felt that Johnson would be lynched if he was not hung without delay according to his sentence. This statement of Mr. Thomas was made public through the press and was introduced

by the Government because of the publicity which was given it as well as because of its weight in showing the state of the public mind, which was a proper matter of inquiry. The reasons which actuated Johnson's lawyers in declining to appeal his case in so far as they were not made public and did not tend to show the condition of the public mind are immaterial and irrelevant to the issues in this contempt proceeding. The evidence found on the above-mentioned pages having been objected to should therefore be excluded.

VIII.

Testimony of Defendants' Wives.

Defendants Justice, Mayes, and Ward introduced, over objection of complainants, the testimony of their wives in support of their alibis. (734, 901, 1975.) At common law the wife of a defendant could not testify in his behalf in a criminal prosecution. While we do not think the statutes of Tennessee could have any bearing upon this question, they have made the wife competent to testify for or against her husband in civil cases (sec. 5596 of Shannon's Code, 1896), but have not removed the common-law disability in criminal cases.

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